STATE OF MICHIGAN

COURT OF APPEALS

ELLIOTT DWAYNE PURTY, Plaintiff-Appellant,	UNPUBLISHED April 27, 2010
v	No. 294368 Oakland Circuit Court Family Division
LAWANA REVELS PURTY, Defendant-Appellee.	LC No. 2007-737833-DM

Before: JANSEN, P.J., AND CAVANAGH AND K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion to relocate her and their children's domicile from Michigan to Tennessee. We affirm.

I. MOTION TO CHANGE DOMICILE

Plaintiff argues that the lower court erroneously granted defendant's motion to relocate her and her children's domicile to Tennessee. We disagree. A trial court's decision to allow a parent to remove a child's residence from the state is reviewed for an abuse of discretion. *Spires v Bergman*, 276 Mich App 432, 436; 741 NW2d 523 (2007); *Rittershaus v Rittershaus*, 273 Mich App 462, 464; 730 NW2d 262 (2007).

A parent of a child, whose custody is governed by court order, shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued without court approval. MCL 722.31(1). A court may permit a legal residence to change if, after considering the following factors, a change is warranted by a preponderance of the evidence, *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004):

> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

> (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
>
> (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. [MCL 722.31(4).]

This Court reviews a trial court's findings related to the above factors under the great weight of evidence standard. *Brown*, 260 Mich App at 600. Under this standard, an appellate court cannot substitute its judgment on questions of fact unless the evidence clearly preponderates in the opposite direction. *Rittershaus*, 273 Mich App at 472-473.

A. CHANGE OF DOMICILE FACTORS

The trial court found that the move to Tennessee would most likely improve the quality of life for the children and definitely improve the quality of life for defendant. See MCL 722.31(4)(a). Contrary to plaintiff's argument on appeal, this finding is not contrary to the great weight of evidence. At the time of the hearing, defendant was unemployed and only had unemployment and child support as income. She could no longer afford a three-bedroom home in the school district where the children attended school. Moreover, she had received no job offers, even though she had applied to approximately 100 employers. Defendant's father offered to provide free housing in a three-bedroom living quarters in Greenback, Tennessee. Furthermore, defendant's cousin offered defendant employment in his janitorial cleaning business in Tennessee. Clearly, with a job and no housing expense, defendant's financial situation would improve greatly, which would correlate to an improvement of the children's quality of life. See *Rittershaus*, 273 Mich App at 466 ("It is well established that the relocating parent's increased earning potential may improve a child's quality of life . . . ."). Additionally, evidence was presented that the quality of education in Tennessee was comparable to, if not better than, the schools the children attended in Michigan.

Plaintiff, however, asserts that the trial court's finding was erroneous because he testified that he could provide free housing to defendant and the children in Michigan. This housing was a two-bedroom house in Pontiac, Michigan. However, defendant explained that having only two bedrooms for her, her 15-year-old daughter, and her ten-year-old son was an untenable solution. Moreover, defendant testified that she felt uncomfortable about the idea of living in a house that plaintiff, who had previously assaulted her, would control and theoretically be able to access. The trial court's refusal to give much weight to plaintiff's proposed "solution" was not against the great weight of evidence. We conclude that the trial court's finding that the children's quality of life would likely improve as a result of the move was not contrary to the great weight of evidence. See MCL 722.31(4)(a).

The trial court also found that defendant's decision to request a change in residence was not based on her desire to frustrate or defeat parenting time of plaintiff. This finding is also not against the great weight of evidence. See MCL 722.31(4)(b). Although plaintiff presented evidence that defendant would make derogatory comments about plaintiff in front of the children and that defendant took a cell phone away from one child and blocked plaintiff's ability to exchange text messages with the other,[1] the great weight of evidence nonetheless demonstrated that defendant's desire to move to Tennessee was based on purely financial reasons. As noted, defendant had no job prospects in Michigan and could no longer afford housing in her school district. The move to Tennessee allowed her to gain employment and free housing, while allowing the children to be placed in a comparable school district. The trial court's finding that defendant's desire to move was not based on a motive to frustrate plaintiff's parenting time was not against the great weight of evidence.

As to the third factor, whether the change in domicile will preserve the parent-child relationship as to each parent, MCL 722.31(4)(c), the court found that

> [w]hile moving to Tennessee would disrupt the current parenting time schedule with Trejuan and Plaintiff-father's ability to participate in Trejuan's school and extracurricular activities, the court is satisfied that there will be a realistic opportunity for parenting time during holidays, summer, school breaks, either in person or via phone or by other technological methods, in lieu of the parenting time schedule in the February 2009 order, which can provide an adequate basis for preserving and fostering the parental relationship with Plaintiff-father, if removal is allowed.

Plaintiff argues that sporadic visitation and phone calls cannot sufficiently replace the constant affection and attention that he could otherwise give the children if they remained in Michigan.

However, our review of the record reveals that the Tennessee school that the children would attend runs on a year-round schedule; specifically, classes run for nine weeks straight, followed by a two-week break. Defendant testified that she would be happy to allow plaintiff overnight parenting time during these two-week recesses. While this parenting time schedule may not be ideal, it does not have to be. The statute merely states that the trial court must consider whether a parenting time order can provide an *adequate* basis for preserving and fostering the parental relationship with plaintiff. MCL 722.31(4)(c). Given that plaintiff could utilize other means of communication during the nine weeks of school and then have two weeks straight of overnights with the children, this can be considered an adequate basis for preserving and fostering a parental relationship. Thus, the court's finding was not against the great weight of evidence.

Lastly, plaintiff does not dispute the trial court's findings as to the fourth and fifth factors, MCL 722.31(4)(d) (parent opposing relocation is motivated by financial advantage) and

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[1] Defendant admitted that she blocked the text messages because they were upsetting the parties' daughter. Defendant denied any involvement with their son losing the cell phone.

(e) (history of domestic violence). And, after our review of the record, we find no reason to disagree. Here, the trial court found that there was no financial advantage to plaintiff opposing the move and that plaintiff assaulted defendant in the presence of the children. With regard to the latter, plaintiff pleaded guilty to committing the offense and was serving a term of probation. These findings were not against the great weight of the evidence.

Given that four of the five factors were in defendant's favor, with one being neutral, the defendant met her evidentiary burden, and we conclude that the trial court's finding that a change in residence was warranted under MCL 722.31(4) was not against the great weight of evidence.

B. ESTABLISHED CUSTODIAL ENVIRONMENT

Plaintiff also argues that the trial court erred by finding that an established custodial environment exists only with defendant. We disagree. A lower court's determination of the existence of an established custodial environment is a question of fact that is reviewed against the great weight of evidence standard. *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).

Once a court determines that a change in residence is warranted, it must determine whether such a move would result in a change of an established custodial environment. *Rittershaus*, 273 Mich App at 470-471. An established custodial environment exists if

> over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

At the time of the lower court's decision on defendant's motion to change domicile, the children had not had an overnight with plaintiff for 16 months. Consequently, the evidence showed that defendant provided daily support for the children. Given the extremely limited time the children had with plaintiff for the preceding year and four months, we cannot conclude that the trial court erred by finding that the children looked to defendant for guidance, discipline, the necessities of life, and parental comfort. The fact that plaintiff's reduced parenting time was a result of restrictions placed on plaintiff because of his assault on defendant is of no consequence as it makes no difference whether the environment was established as a result of a temporary or permanent custody order, in violation of a custody order, or in the absence of a custody order. *Berger*, 277 Mich App at 707. The reasons behind why a custodial environment exists are irrelevant. *Treutle v Treutle*, 197 Mich App 690, 693; 495 NW2d 836 (1992). Accordingly, the trial court's finding that an established custodial environment existed with defendant at the time of the hearing was not erroneous.[2] Further, because a trial court is not required to consider the

[2] We note in passing that defendant focuses his argument on the pre-divorce time period where he had daily contact with the children. However, the language of MCL 722.27(1)(c) uses present-tense language, which reveals an intention by the Legislature to evaluate whether a
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best interests factors unless it determines that the relocation would change the established custodial environment of the children, *Rittershaus*, 273 Mich App at 470-471, the trial court did not err by not considering those factors. The trial court did not abuse its discretion when it granted defendant's motion to change the children's legal residence.

II. TRAVEL EXPENSES

Plaintiff also argues that the trial court erred by ordering him to be solely responsible for all the costs, including travel expenses, associated with his parenting time in the future. In plaintiff's view, it is unfair that he has to bear this burden alone when it was defendant who chose to leave the state. We disagree. We review a trial court's determination regarding payment of travel expenses for an abuse of discretion. *Brown*, 260 Mich App at 604. A court must consider the feasibility of any parenting time plan from a practical and financial viewpoint. *Id*. at 605.

Here, nothing in the record indicates that requiring plaintiff to cover costs related to parenting time is not financially feasible. As of the date of the hearing, plaintiff earned more money than defendant: plaintiff makes approximately $75,000 per year, while defendant will be working part time for $10 per hour. In addition to the earning discrepancy between the parties, plaintiff was paying HAVEN[3] nearly $250 per month for supervised visits with his children for one hour per week. Now that the HAVEN visits are no longer required, it is likely that this money can contribute to costs associated with plaintiff's parenting time. Thus, the evidence demonstrates that the costs associated with parenting time are feasible for plaintiff. Accordingly, the trial court did not abuse its discretion by requiring plaintiff to pay these costs.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly

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custodial environment *currently exists* at the time of the hearing.

[3] HAVEN is a nonprofit organization that provides services to families that have experienced domestic violence.